Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone	)	
Cooperative, Inc. for Order Declaring it to	)	WC Docket No. 02-78
be an Incumbent Local Exchange Carrier	)	
in Terry, Montana Pursuant to Section	)	
251(h)(2)	)	

REPLY COMMENTS OF IOWA TELECOMMUNICATIONS SERVICES, INC.
(D/B/A IOWA TELECOM)

Donald G. Henry
Edward B. Krachmer

IOWA TELECOM
115 S. Second Avenue West
Newton, Iowa 50208
(641) 787-2000

January 14, 2005

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone	)	
Cooperative, Inc. for Order Declaring it to	)	WC Docket No. 02-78
be an Incumbent Local Exchange Carrier	)	
in Terry, Montana Pursuant to Section	)	
251(h)(2)	)	

REPLY COMMENTS OF IOWA TELECOMMUNICATIONS SERVICES, INC. (D/B/A IOWA TELECOM)

Iowa Telecommunications Services, Inc. (d/b/a Iowa Telecom) ("Iowa Telecom") hereby submits the following Reply Comments in response to the Federal Communications Commission's ("FCC's") Notice of Proposed Rulemaking concerning the Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2) ("*Notice*").[1]

INTRODUCTION AND SUMMARY

In its Comments, Iowa Telecom explained in detail how Section 251(h)(2) pertains only to treatment under Section 251 and how other matters, such as the regulatory treatment of ILECs for universal service and interstate access charge purposes are separate legal and policy considerations and should be considered separately in their appropriate dockets and on their own merits.[2] Iowa Telecom also observed that the Commission should, however, recognize the direct

[1] *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Notice of Proposed Rulemaking, WC Docket No. 02-78, FCC-04-252 (rel. Nov. 15, 2004)("*Notice*").

[2] Iowa Telecom Comments at 4-11.

logical link between Section 251(h)(2) and appropriate treatment of the historic ILEC under Section 251 by removing Section 251(c) (ILEC) obligations from the historic ILEC to the extent such obligations are imposed on a CLEC in the same geographic market.[3]

Iowa Telecom in these reply comments explains how commenters in this proceeding have yet to establish a clear legal relationship between a carrier being treated as an incumbent local exchange carrier ("ILEC") for purposes of Section 251 and other provisions of the Communications Act of 1934, as amended, as well as other provisions of the Commission's rules. Iowa Telecom also demonstrates why a presumption that the Commission should forbear from applying Section 251 ILEC obligations on the historic ILEC serving a geographic area at issue in a Section 251(h)(2) petition is reasonable.

THERE IS NO DIRECT LEGAL CONNECTION BETWEEN A CARRIER'S STATUS AS THE INCUMBENT UNDER SECTION 251 AND ITS STATUS AS AN "ILEC" FOR OTHER STATUTORY AND REGULATORY PURPOSES.

In its Comments, Iowa Telecom exhaustively analyzed the use of the term "incumbent local exchange carrier" in the Act and the Commission's rules. Through such an analysis, Iowa Telecom demonstrated the lack of legal relationship between the regulatory treatment of a carrier under Section 251 and such a carrier's status as an ILEC under other regulatory regimes.[4] In addition, Iowa Telecom discussed how the applicability of Section 251(h)(2) is explicitly limited to a carrier's treatment under Section 251 and, in addition, merely provides for treating the carrier as an ILEC, without with actually <u>defining</u> the carrier to be an ILEC.[5] Therefore, as Iowa Telecom stated, the Commission may only consider the public interest benefits and detriments of

[3] *Id.* at 11-14.

[4] *Id.* at 4-9.

[5] *Id.* at 5.

imposing the market-opening obligations of Section 251(c) on the CLEC – not unrelated effects relating to hypothetical future regulatory filings or improperly presumed automatic legal consequences.[6]

No commenter appears to have presented any arguments rebutting this analysis. Some parties, however, enter into a normative discussion of whether a CLEC that is treated as an ILEC for Section 251 purposes (pursuant to Section 251(h)(2)) should be treated as an ILEC for purposes of the universal service and interstate access regulatory regimes.[7] Iowa Telecom does not object to the Commission considering such matters, so long as the Commission recognizes that they are not pertinent to the public interest benefits or detriments that the Commission must consider pursuant to Section 251(h)(2)(C). Instead, the Commission should treat the significance of such issues as a further justification for considering such matters separately from a carrier's Section 251 ILEC status.

AS A GENERAL MATTER, THE COMMISSION SHOULD REMOVE SECTION 251(C) OBLIGATIONS FROM THE HISTORIC ILEC TO THE EXTENT SUCH OBLIGATIONS ARE IMPOSED ON A CLEC IN THE SAME GEOGRAPHIC MARKET.

As discussed in Iowa Telecom's comments, it is very likely that the factual basis for a Commission finding that an historic ILEC has been "substantially replaced" by a CLEC, necessary to satisfy Section 251(h)(2)(C), will also require a conclusion that the historic ILEC no longer has market power in the provision of wholesale local telecommunications service.[8] In light of this near unity of relevant facts, the unfair and economically inefficient consequences of

---

[6] *Id.* at 4-5.

[7] *See*, *e.g.*, AT&T Corp. Comments at 5-6; SBC Communications Inc. Comments at 3-6, 8; Qwest Communications International, Inc. Comments at 4-9.

[8] Iowa Telecom Comments at 13-14.

maintaining the historic ILEC's Section 251(c) obligations, and administrative efficiency concerns, Iowa Telecom suggested that, as a matter of course, the Commission, in seeking comment on Section 251(h)(2) petitions should seek comment on its own motion whether the Commission should forbear under Section 10 from applying Section 251(c) obligations to the historic ILEC.[9] In considering the merits of such forbearance, the Commission should establish a rebuttable presumption that, to the extent that the CLEC has, indeed, substantially replaced the historic ILEC and that imposing Section 251(c) obligations on the CLEC is in the public interest, each of the requirements for forbearance under Section 10 regarding the historic ILEC is met.

Iowa Telecom believes that it would be reasonable for the Commission to establish such rebuttable presumptions in considering whether to forbear from applying Section 251(c) obligations to an historic ILEC, conditional on a finding in the Section 251(h)(2) context that the historic ILEC has been "substantially replaced." Some commenters argue against actually granting such forbearance in such circumstances.[10] The criticisms raised by those commenters, however, do not necessarily weigh against the Commission establishing presumptions in favor of the historic ILEC but, instead, if supported by fact, may be relevant arguments to raise on a case-by-case basis.

Section 10(a) of the Act requires the Commission to forbear from application of a provision of the Act to a telecommunications carrier if the Commission finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

[9] *Id.*

[10] *See, e.g.*, General Communication, Inc. ("GCI") Comments at 14-17; Montana Public Service Commission Comments at 8-10.

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[11]

Specifically with regard to forbearance from application of Section 251, Section 10(d) provides that "[e]xcept as provided in Section 251(f), the Commission may not forbear from applying the requirements of Section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[12] In the vast majority of circumstances in which the Commission would find that Section 251(h)(2)(B) has been met, the Commission will be able to make the appropriate Section 10 findings. In light of this, the Commission would be justified in at least establishing a rebuttable presumption that the Section 10 requirements have been met (conditional on a positive finding under Section 251(h)(2)(B)).

With regard to the requirement of Section 10(a)(1), Iowa Telecom believes that enforcement of Section 251(c) against a substantially replaced historic ILEC is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that historic ILEC and wholesale local telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. In many geographic areas similar to and including the exchange at issue in this proceeding, CLECs have achieved between 70 and 95 percent market share and have done so virtually through exclusive use of their own facilities – it is very rare for CLECs reliant on unbundled network elements ("UNEs") to achieve such market

[11] 47 U.S.C. § 160(a).

[12] 47 U.S.C. § 160(d).

share.[13] Assuming that no carrier can have a 100% take rate, it seems reasonable to assume that the networks of facilities-based CLECs with 70 to 80% market share are able to address somewhere in the range of 80 to 90 percent of the market. Thus, if Section 251(c) obligations were to be imposed on such a CLEC, there will be a rate-regulated (cost-based) supply of unbundled loops throughout the vast, if not overwhelming, majority of the geographic market. This makes imposition of an unbundling requirement on the historic ILEC unnecessary. The same analysis holds true for all bottleneck services and facilities subject to Section 251(c).

Further, the Commission need not be concerned that the CLEC on which Section 251(c) obligations are to be imposed may not address all customer locations in the relevant geographic market, leaving a small portion of customers in that market without a facilities-based alternative. In such a circumstance, consumers at the few relatively-few historic ILEC customer locations not addressable by a CLEC that has substantially replaced the historic ILEC would receive the benefits of the retail competition in the geographic market. Because state commissions will most likely continue to require the historic ILEC to charge uniform retail rates (by class of service) throughout its exchange,[14] consumers in the few customer locations served only by the historic ILEC will be charged the competitively-driven rate, despite the fact that they, themselves, do not have a facilities-based competitive choice.

In the context of Section 251(c) obligations, the only significant finding required by the Commission under Section 10(a)(2) ("enforcement of such regulation or provision is not necessary for the protection of consumers") not already required by Section 10(a)(1) would seem

[13] GCI, for example, argues that UNE-based competition does not necessarily provide the a sufficient alternative source of competition. Although Iowa Telecom does not necessarily agree with GCI's assertion, Iowa Telecom believes that this concern will tend to be moot in the majority of Section 251(h)(2) proceedings.

[14] In most circumstances, the CLEC will be subject to the same requirement.

to relate to the need to maintain service quality. For an historic ILEC to remain viable in a geographic market in which it has been substantially replaced by a CLEC, it will have to compete on the basis of service quality as well as price. To that extent, the requirement of Section 10(a)(2) in such instances should be presumed to have been met.

When the first two requirements of Section 10(a) have been met with regard to Section 251(c), it should almost always, if not always, also be in the public interest for the Commission to forbear from imposing Section 251(c) obligations on the ILEC – the third requirement of Section 10(a). The Commission has repeatedly found it to be in the public interest to eliminate truly unnecessary regulation due to economic and administrative efficiencies.[15] Any potential harm from such forbearance would already be considered under the other requirements of Section 10(a).

Finally, the Commission should also presume that the requirements of Section 251(c) have been "fully implemented" as required by Section 10(d).[16] In circumstances in which a CLEC has substantially replaced the historic ILEC, it would be apparent that the historic ILEC has implemented all provisions of Section 251 necessary for competitive entry in that particular market. The historic ILEC cannot "implement" any Section 251(c) obligations that have not been the subject of a request by a CLEC.

Iowa Telecom emphasizes that it is merely requesting that the Commission establish rebuttable presumptions with regard to considering forbearing from applying Section 251(c) obligations on an historic ILEC in a market in which the Commission has determined that the

[15] *See, e.g.*, *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221 (1999); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

[16] Because Iowa Telecom is not subject to Section 271, Iowa Telecom will not discuss the requirement that Section 271 also be fully implemented.

requirements of Section 251(h)(2) have been met. These presumptions could certainly be overcome in instances in which the presumptions are not justified.

CONCLUSION

For the reasons discussed above and in Iowa Telecom's Comments, Iowa Telecom respectfully requests that the Commission recognize that Section 251(h)(2) pertains only to treatment under Section 251. Other matters, such as ILEC treatment for universal service and interstate access charge purposes, and their effect on the public interest are separate legal and policy considerations and should be considered separately in their appropriate dockets and on their own merits. Iowa Telecom again emphasizes that forbearance from application of Section 251(c) to the historic ILEC in geographic markets at issue in Section 251(h)(2) proceedings would typically be justified and that the Commission therefore should establish rebuttable presumptions regarding the same.

Respectfully submitted,

IOWA TELECOMMUNCIATIONS SERVICES, INC. D/B/A IOWA TELECOM

By: *_/s/ Donald G. Henry_*
Donald G. Henry
Edward B. Krachmer

115 S. Second Avenue West
P.O. Box 1046
Newton, Iowa 50208
(641) 787-2000

Dated: January 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of January 2005, I caused copies of the foregoing Reply Comments in response to the Commission's Notice of Proposed Rulemaking concerning the Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2) to be served on the following parties by electronic mail.

/s/ Edward B. Krachmer
Edward B. Krachmer

Janice M. Myles
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 I Street, N.W.
Suite 520
Washington, DC 20037

Best Copy and Printing, Inc.
445 Twelfth St., S.W.
Room CY-B402
Washington, DC 20554